Date: January 21, 1998

Case No.: 98-TLC-4

In the Matter of

ANGELICA NURSERIES, INC.,
Employer.

Appearances: Robert E. Williams, Esq.
for Employer

Elizabeth Hopkins, Esq.,
for the U.S. Department of Labor

BEFORE: JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. § 110 1 (a)(1 S)(H)(ii)(a), and its implementing regulations, found at 20 C.F.R. Part 655.[1] This Decision and Order is based on the written record, consisting of the Employment and Training Administration appeal file ("AF"), and the written submissions from the parties. § 655.112(a)(2). Angelica Nursieries, Inc. has requested expedited review of the decisions by a U.S. Department of Labor Regional Administrator ("RA") denying two applications for temporary alien agricultural labor certification for Field operations pool workers, based on the finding that Employer's mandate that workers establish that they have health insurance coverage or Employer will deduct $20 per week for participation in its health plan is unreasonable.[2]

STATEMENT OF THE CASE

Angelica Nurseries, Inc. filed two applications on December 24, 1997, for temporary alien agricultural labor certification. (AF 44-60 and 61-77). The RA notified Employer by letter dated December 30, 1997, that the applications were unacceptable, *inter alia*, because Employer

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[1] Unless otherwise noted, all regulations cited in this decision are in Title 20.

[2] The R.A. also found that Employer's wage offer was below the prevailing hourly rate in Maryland and other minor omissions. These issues are not before us on appeal as Employer has corrected, to ETA's satisfaction, these deficiencies. (Solicitor's Brief at 3)

mandated that employees who are unable to provide documentation of health insurance coverage participate in its health insurance plan (AF 29).

Counsel for Employer argues that its mandatory deduction of $20 per week from paychecks of employees not otherwise covered by a health insurance plan is not *per se* unreasonable (Employer's Brief at 4). Counsel points out that the only requirement imposed by the regulations on employer deductions is that they be "reasonable." *Id*. (*citing* §655.1102(b)(13)). Thus, it is Counsel's position that the regulations contemplate that mandatory deductions, so long as they are "reasonable," may be permissible. As further support for its view that mandatory deductions are not *per se* unreasonable, Counsel refers to the other subsections of §655.102(b) which lists the minimum benefit, wage and working conditions that each job offer must contain and for which an employer may not pass the cost on to the employee,[3] and health insurance is not listed as a benefit for which an employer may not deduct. §655.102(b) *et seq*.

Counsel for Employer also argues that, "[a]s a matter of fact, the health insurance deduction [herein] satisfies the reasonableness standard provided by the regulations." (Employer's Brief at 5). Counsel states that in the past, employees of Employer have been uninsured and have burdened the local health care providers by providing health care that has gone uncompensated. As "the largest agricultural employer in Maryland, and a dominant employer in [the] community" Employer created this mandatory employer-sponsored health plan as a benefit to its employees and in the interest of being a good corporate citizen. *Id*. at 6-7.

The Office of the Solicitor, as counsel for ETA (the "Solicitor" or "ETA"), fashions the issue of the case as "whether it is reasonable in these or any other circumstances to require employees to pay for health insurance coverage, whether or not they desire such coverage." (Solicitor's Brief at 5). The Solicitor refers to Black's Law Dictionary in defining how the term "reasonable" is judged by the law. *Id*.[4] Because it is not "ordinary or usual" for employers to require employees to pay for or even have health insurance coverage, the Solicitor asserts that the IL4 was within his discretion in finding that Employer's requirement of mandatory health insurance was not "reasonable." The Solicitor also asserts that the Employee Retirement Income Security Act ("ERISA") has no bearing on the issue of whether this deduction is "reasonable" for the purposes of the H-2A program.[5] The Solicitor concedes that mandatory health insurance

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[3] E.g., housing (for workers who do not live in the area), workers' compensation insurance, tools, supplies, equipment, transportation between living quarters and worksite, transportation and subsistence to and from place of employment (subject to the 50% rule).

[4] Reasonable is defined as "[j]ust; proper. Ordinary or usual. Fit and appropriate to the end in view. . . ." *See* Black's Law Dictionary, at 1431 (Rev. 4th ed. 1957).

[5] ETA put forth, and the Solicitor concurs, that "although ERISA may govern this plan, the fact is that, Angelica's assertions notwithstanding, there is no such thing as an "ERISA-approved" plan and nothing in ERISA purports to regulate the reasonableness of health

(continued...)

deductions, under the right circumstances may be reasonable *Id,* at 5; however, in this instance, Employer has "not only failed to make a convincing showing that requiring employees to purchase health insurance would provide some overall benefit for both the U.S. and the H-2A employees, but also has failed to establish the terms of the coverage and therefore to show that $20 per week is a reasonable premium for such coverage." *Id*. at 6. In this regard, the Solicitor asserts that ETA erred, *albeit* harmless error, in stating that had the $20 per week deduction been voluntary, it would have been found to be "reasonable." *Id*. at 6, fn 1.

DISCUSSION

The RA based his determination denying temporary labor certification on the ground that Employer's "health program as a condition of employment is not required by Federal, State or local law. .... The $20 per week mandatory deduction for those employees not otherwise covered by health insurance is not a reasonable deduction because **mandatory** health insurance is not a normal requirement for this job opportunity, or for any other job opportunity in the United States." (AF 30 **emphasis** original). Employer's argument on review is essentially that the mandatory deductions are reasonable because the deductions are "only $20 per week", and because the provision of uninsured medical services was becoming such a burden on the local community, it was compelled to institute a "mandatory health insurance plan for its workers." (Employer's Appeal Brief at 6).

It is not necessary to decide today whether mandatory health insurance deductions are *per se* unreasonable within the meaning of the regulations – in fact, the Solicitor concedes that it is possible that an employer could establish the reasonableness of a mandatory deduction of this type -- because, Employer herein has failed to provide any documentation[6] to support its assertion that mandatory health insurance deductions are reasonable with regard to these applications.[7] Such a showing might include, for example, documentation that without a mandatory deduction, so few employees would participate that an employer sponsored plan would be cost-prohibitive or that public care facilities would be overwhelmed.

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[5](...continued)
insurance premiums or the adequacy of coverage." (Solicitor's Brief at 5).

[6] The Board of Alien Labor Certification Appeals has held that although a written assertion constitutes documentation that must be considered under ***Gencorp***, 87-INA- (Jan. 13, 1988) (*en banc*), a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. ***Rajwinder Kaur Mann***, 95-INA- (Feb. 6, 1997).

[7] The RA asserted that mandatory health insurance deductions are not normal for this occupation or other job in the U.S. Rather than challenging this assertion, Employer merely argued that "typicality is not the *sine qua non* of reasonableness," and that innovation is not inherently unreasonable.

The burden of proof is on Employer to establish its eligibility for a temporary alien labor certification. *See* 8 U.S.C. § 1361. Because the record contains no documentation to support Employer's assertion that a *mandatory* deduction for health insurance is reasonable, the RA's determination denying temporary alien labor certification must be Affirmed.[8] Accordingly,

ORDER

The determination of the Regional Administrator in the above case is hereby **AFFIRMED**.

SO ORDERED.

JOHN M. VITTONE
Chief Administrative Law Judge

[8] I note that in her brief on review, the Solicitor maintains that the RA erred in suggesting that he would approve a voluntary $20 per week deduction for health insurance. In view of my ruling, it is not necessary to address this issue. I observe, however, that in assessing the reasonableness of a deduction, it would be proper for a RA to inquire into whether the service or benefit is reasonable in relation to the deduction.